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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 196.

PHILADELPHIA BAR ASSOCIATION
Appd

LOVELL AND BAILEY—W. S. BAILEY, J. F. LOVELL, AND T. F. GWATHMEY—PLAINTIFFS IN ERROR,

vs.

JAMES DAVIS, MASTER OF THE SHIP ADORNA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 27, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 196.

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1 *Petition, copy of charter-party, and Exhibits A & B.—Filed Nov. 25th*, 1871.

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit, and district of Louisiana.

JAMES DAVIS, MASTER OF SHIP ADORNA,
versus
LOVELL AND BAILEY. } No. 6567.

To the hon. the judges of the circuit court of the United States, fifth circuit, district of Louisiana:

The petition of James Davis, a resident of New York City, and a citizen of the State of New York, respectfully represents:

That the commercial firm Lovell and Bailey, located and doing business in the city of New Orleans, and composed of J. F. Lovell and W. S. Bailey and T. F. Gwathmey, all of whom reside in said city of New Orleans, and are citizens of the said State of Lousiana, are indebted in solido to your petitioner in the full sum of twenty-nine thousand
2 four hundred twenty-six & $\frac{39}{100}$ (29,426$\frac{39}{100}$) dollars now due and owing to your petitioner.

For this, viz: That your petitioner instructed James H. and John Wylie & Co., his agents at Mobile, Alabama, to obtain a charter for his said vessel, and they did, through Decan, Zerega & Co., of this city, charter his ship, called the Adorna, to the said firm of Lovell and Bailey, on the 14th day of March, 1871, "for a voyage from the port of New Orleans to Liverpool, between Havre and Hamburg, both inclusive, or Constadt," on the terms following (and others not stated herein):

"First. The said party of the first part (meaning thereby your petitioner) agrees that the said vessel in and during the said voyage shall be kept tight, staunch, well-fitted, and provided with men and provisions necessary for the voyage.

"Second. That the whole of said vessel (with the exception of the cabin, the deck, and the necessary room for the crew, her tackle, sails, and provisions) shall be at the sole use of the party of the second part (meaning thereby the said Lovell and Bailey).

"Third. The said party of the first part agrees to take and re-
3 ceive on board the said vessel, during the aforosaid voyage, a full and complete cargo of cotton in compressed bales, ship paying the compressing, and the said party of the second part, in consideration of the agreements to be kept and performed by the said party of the first part, doth agree to charter and hire the said vessel on the terms following, viz:

"First. The said party of the second part doth agree to furnish said vessel a full and complete cargo of cotton in compressed bales.

"Second. The said party of the second part doth further agree to pay the said party of the first part, or agent, for the charter or freight of said vessel, if to Liverpool or between Havre and Hamburg, both inclusive, five eighths of a penny sterling per pound, with five per cent. primage; if to Constadt, eleven-sixteenths of a penny sterling per pound, with five per cent. primage; if ordered to Liverpool, freight to be paid on delivery of weight; if to the continent, on American weight.

"It is further agreed that said party of the second part shall be allowed

for the loading of said vessel forty-five days, Sundays excepted, and for discharging according to the custom of the port of discharge.

4 "It is also agreed that this charter shall commence when the vessel is ready to receive cargo at the place of loading, and notice is given thereof to the party of the second part or to their agent, and end on a true delivery of cargo at the port of discharge.

"To the true performance of the foregoing agreements the said parties do hereby bind themselves, their heirs, executors, administrators, and assigns, and also the said vessel, her freight and appurtenances, and the merchandise laden on board, each to the other in the final sum of amount of charter-party."

All of which will more fully appear from a true copy of said charter-party hereto annexed & made a part hereof.

That in order to secure said contract of charter-party, the price of freight was stipulated at $\frac{5}{8}$ of a penny per lb., when the ruling rates were three farthings, being one-eight ($\frac{1}{8}$) of a penny less than the then ruling rates.

Petitioner shows that at the time said contract of charter-party was entered into, the said ship Adorna was at sea bound on a voyage from Liverpool to the port of New Orleans, which fact was well known to the defendants.

5 That after the date of said charter-party freights began to fall and continued to fall in price until on or about the 14th day of April, 1871, when the defendants plainly saw that their loss must be very heavy indeed under said contract, and they set to work to avoid and annul the same, if possible, and thus to escape all loss under the same, and freights continued to decline until long after the 14th day of April, 1871, and have never since that day reached the price they were on the day said charter-party was entered into.

The defendants did, in order to avoid said contract, write and deliver a certain letter to the said Decan, Zerega & Co., of which the following is a true copy:

NEW ORLEANS, *April 14th*, '71.

Messrs. DECAN, ZEREGA AND CO.:

GENTLEMEN: In consequence of Capt. Davis refusing to bring his ship Adorna to this port in the usual and customary way, and our losing the cotton engaged for her, we consider and notify you that the charter signed by us for his ship is cancelled.

We are, very resp'y,

LOVELL AND BAILEY.

6 Now, petitioner shows that his vessel reached the mouth of the Mississippi River on the 9th of April, 1871, when he caused the usual signal to be made for a steam towboat to come to his said vessel and tow her to the port of New Orleans, but no towboat could then be obtained; whereupon your petitioner set sail and came across the bar, and not finding a towboat there he continued up the river Miss. until his vessel reached the English Turn, when he obtained the assistance of a steam tugboat, and had his vessel towed to the port of New Orleans, which port your petitioner reached on the 15th day of April with his vessel, and proceeded immediately to discharge cargo and get ready to receive cargo under said contract of charter-party, and in pursuance of the terms thereof.

That on or about the 21st day of said month of April said ship was ready to begin to receive cargo under said charter-party, and your peti-

tioner notified defendants thereof, and called upon defendants for cargo, and tendered them his said vessel in pursuance of said contract of charter-party, and the defendants declined and refused to load said vessel, stating, at the same time, that they had put an end to said char-
7 ter-party, and had annulled the same by means of their letter above copied.

Petitioner shows that the attempt of the defendants to cancel and annul said agreement amounted to nothing more than an active violation of same, and thereby rendered it unnecessary for your petitioner to put them in default by a tender of said ship, as above stated.

That after having passed over a great portion of the distance (over which towboats usually tow incomming vessels), your petitioner could have obtained a towboat upon paying full towage, which was an extortionate demand, to which your petitioner would not submit, and in law he was not compelled to submit to such an illegal, unjust, and unreasonable demand. That if your petitioner's vessel had reached the bar five days sooner than she did, and had immediately taken steam, she could not have reached the port of New Orleans and been ready to receive cargo on the 14th day of April, 1871, in pursuance to said charter-party; and said charter-party by its terms did not require your petitioner to have his vessel in the port of New Orleans in readiness to receive cargo on or before 14th day of April, 1871, or any other particular day.

8 That your petitioner was entitled to a reasonable and proper time under said charter-party to bring his said vessel to the port of New Orleans, and put her in condition to receive cargo according to the terms thereof, and your petitioner shows that he did in fact reach the port of New Orleans and have his vessel in readiness, according to the terms of said charter-party, to receive cargo, and did tender the said vessel to receive cargo, as hereinbefore set forth, within a reasonable & proper time. Petitioner further shows that he has not been able to obtain a cargo for his said vessel at paying rates, and is still remaining in this port for the purpose of obtaining a cargo for his vessel. That by reason of the premises the said defendants become indebted to your petitioner in the same manner and to the same extent as they would have been had he carried a full cargo in his said ship under said charter-party, and in accordance with the terms of said charter-party.

That his said ship could have carried, if she had been loaded as stipulated in said charter-party, 1,911,000 pounds of cotton, the freight on which, together with the primage, could have amounted to
9 the sum of 5,389£ 9 shillings sterling, equivalent, in lawful currency of the United States, to the said sum of 29,426 $\frac{39}{100}$ dollars, as per Exhibits A and B hereunto annexed and made part hereof.

Wherefore petitioner prays that the said firm of Lovell and Bailey be cited, & after due proceedings had that your petitioner do have and recover judgment against said firm of Lovell & Bailey, and the individual members thereof, viz, J. F. Lovell, W. S. Bailey, & T. F. Gwathmey, in solido, for the sum of \$29,426 $\frac{39}{100}$, with legal interest on the same from the 14th day of April, '71, until paid, and the costs of suit, & for all further general and equitable relief that may in the premises be granted.

(Signed) RANDOLPH, SINGLETON & BROWNE,
Atty's for Petitioner.

Citation.—Issued Nov. 25th, 1871.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

You are hereby commanded to summon the commercial firm of Lovell and Bailey & T. F. Gwathmey, citizens of the State of Louisiana, to comply with the demand of James Davis, master of ship Adorna, and a citizen of the State of New York, contained in the petition of which a copy accompanies this citation, or to deliver their answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, or judgment will be rendered against them by default, which delay is increased one day for every ten miles the defendants' residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of December, 1871.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 25th day of November, A. D. one thousand eight hundred & seventy-one, and the 96th year of the Independence of the U. S. of America.

[SEAL.] F. A. WOOLFLEY, *Clerk*,
By F. B. VINOT, *Dy Clerk*.

Exhibit A, referred to in petition, and filed November 25th, 1871.

Decan, Zerega & Co., 43 Carondelet street.

⅛ ½	1971000 lbs.		1971000 lbs.
			⅝ sterling.
¼	985500		
	246375		8) 9855000
	1231875		1231875 D.
	5		5 primage.
	6159375		61593(75
	1231875		1231875
	Coulet.		
	)1293468		2) 1293468
	2) 107789		2) 10778 (9
	£5389. 9. 0		£5389. 9. 0

Exhibit B, referred to in petition, and filed November 25th, 1871.

Rate of exchange, as pr. Broker, June 5th, 1871; sterling exchange quoted at 123; one pound sterling equals $5.46 in currency.

£ 5389. 90
$ 546

32334
21556
26945

29423(94
2.45

29426(39 Amount in currency.

Correct.

CAPT. JAMES DAVIS.

12 *Marshal's return.*

Received, Nov. 25, '71, by the U. S. marshal, and on the same day, month, and year served a copy hereof, with petition accompanying it, on Lovell & Bailey, defendants, by handing the same to W. S. Bailey, one of the members of said firm, at No. 33 Carondelet street in the city.

Nov. 25, '71.

(Signed) S. W. REED,
D'y U. S. Marshal.

Answer.—Filed Dec. 12th, 1871.

U. S. circuit court, fifth circuit, district of Louisiana.

JAMES DAVIS, MASTER OF SHIP ADORNA, *vs.* LOVELL & BAILEY. } No. 6567.

Now comes Lovell & Bailey, defendants in the above-entitled cause, and for answer to said plaintiff's petition deny all and singular the allegations thereof, except such as are hereinafter specially admitted.

Further answering, they say that they entered into a contract of charter-party with Decan, Zerega & Co., a commercial firm residing & transacting business in New Orleans, one part of which contract
13 is hereunto annexed, marked A. That the ship Adorna failing to reach the port of New Orleans, and refusing to adopt the usual modes of reaching said port according to usage, and her arrival not to be anticipated within a reasonable period, these respondents notified said Decan, Zerega & Co. that the said contract was broken & cancelled, and that said Decan, Zerega & Co. thereupon cancelled the same.

Wherefore they pray judgment against said plaintiff with costs.

(Signed) CLARKE, BAYNE & RENSHAW, *Att'ys.*

Verdict & judgment.—Extract from minutes, November term, 1877.

NEW ORLEANS, *Monday, March 12th*, 1877.

Court met pursuant to adjournment. Present, Hon. Wm. B. Woods, circuit judge.

JAMES DAVIS, MASTER OF THE SHIP ADORNA, *versus* LOVELL & BAILEY. } 6567.

The trial of this cause was resumed before the court & jury, and after hearing argument and receiving a charge from the court the jury retired to consider on their verdict. After due deliberation they returned
14 into court and delivered the following verdict, to wit:

We, the jury, find a verdict in favor of plaintiff, Capt. James Davis, master of the ship Adorna, and against defendants, Messrs. Lovell & Bailey, in solido in the sum of eleven thousand seven hundred and seventy $\frac{56}{100}$ doll's ($11,770$\frac{56}{100}$), with legal interest from judicial demand, & costs.

New Orleans, March 12th, 1877.

EDMUND M. IVENS, *Foreman.*

Whereupon it was ordered that the same be recorded.

JAMES DAVIS, MASTER OF THE SHIP ADORNA,
vs.
LOVELL & BAILEY. } 6567.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, James Davis, master of the ship Adorna, recover from the firm of Lovell & Bailey, and from J. F. Lovell, W. S. Bailey, and T. F. Gwathmey, the individual members thereof, in solido, eleven thousand seven hundred and seventy $\frac{58}{100}$ dollars, with five per cent. per annum interest from the 25th November, 1871, until paid, and costs of suit.

Defendants' bill of exceptions—Filed March 12th, 1877.

15 U. S. circuit court, district of Louisiana.

JAMES DAVIS
vs.
LOVELL & BAILEY.

Be it remembered that on the the trial of this cause, the plaintiff having offered in evidence the charter-party, as follows:

Charter-party.

This charter-party, made in the city of New Orleans, fourteenth day of March, in the year one thousand eight hundred and seventy-one, between Decan, Zerega & Co., representing the owners of the Am. ship Adorna, of New York, of the burden of fourteen hundred and sixty tons, or thereabouts, now lying in the harbor of New Orleans, of the first part, and Messrs. Lovell & Bailey, merchants of New Orleans, of the second part, witnesseth:

That the said party of the first part, in consideration of the agreement hereinafter mentioned, to be kept & performed by the said party of the second part, do agree on the freighting and chartering of said vessel, to the said party of the second part, for a voyage from the port of New Orleans to Liverpool, between Havre and Hamburg, both inclusive, or Constadt, on the terms following, viz:

First. The said party of the first part agrees that the said ves-
16 sel in and during the said voyage shall be kept tight, staunch, well-fitted, and provided with men and provisions necessary for such voyage.

Second. That the whole of the said vessel (with the exception of the cabin, the deck, and the necessary room for the crew, her tackle, sails, and provisions) shall be at the sole use of the said party of the second part.

Third. The said party of the first part agrees to take & receive on board the said vessel during the aforesaid voyage a full and complete cargo of cotton in compressed bales, ship paying the compressing.

And the said party of the second part, in consideration of the agreements to be kept & performed by the said party of the first part, doth agree to charter & hire the said vessel on the terms following, viz:

First. The said party of the second part doth agree to furnish said vessel a full and complete cargo of cotton in compressed bales.

Second. The said party of the second part doth further agree to pay the said party of the first part, or agent, for the charter or freight of

said vessel, if to Liverpool or between Havre & Hamburg, both inclusive, five-eight' of a penny sterling per pound, with five per cent.
17 primage; if to Constadd, eleven-sixteenths of a penny sterling per pound, with five per cent. primage. If ordered to Liverpool, freight to be paid on weight delivered; if to the continent, on American weight.

It is further agreed the said party of the second part shall be allowed for the loading of said vessel forty-five days, Sundays excepted, and for discharging according to the custom of the port of discharge.

And in case the vessel is longer detained by said party of the second part, or their agents, demur'age is to be paid the vessel's agent at the rate of twenty pounds per day, day by day, for every day so detained. It is further agreed that the cargo or cargoes shall be delivered & received alongside, within reach of the vessel's tackles.

It is also agreed that this charter shall commence when the vessel is ready to receive cargo at the place of loading and notice thereof is given to the party of the second part, or to their agent, and end on a true delivery of cargo at the port of discharge.

It is further agreed the vessel is to be consigned to charterers' friends, allowing them the usual commission for transacting the vessel's
18 inward business, and five per cent. to be paid here to Decan, Zerega & Co.

To the true performance of the foregoing agreement the said parties do hereby bind themselves, their heirs, executors, administrators, & assigns, & also the said vessel, her right & appurtenances, & the merchandise laden on board, each to the other, in the penal sum of amount of charter-party.

In witness whereof the said parties have hereunto set their hands the day & date of this charter-party.

(Signed) LOVELL & BAILEY.
" DECAN, ZEREGA & CO.

Signed in the presence of—
FRANK M. HALL.

And evidence having been given that the said ship Adorna was at sea on the said 14th of March, 1871, having left the port of Liverpool, England, bound for New Orleans, on the first of February, 1871; and evidence having been produced tending to prove that after a voyage three or four days longer than the average said vessel arrived at the mouth of the river Mississippi on the 9th of April, 1871, where towboats and steam-tugs are usually lying, that the Adorna got her pilot
19 and set her colors for steam, but no steam-tug being offered her, she sailed over the bar & came to anchor till next day, when, the wind being fair, she proceeded to sail toward New Orleans and had accomplished about one-fourth of the distance before any steam-tug was offered her. ("When I reached the mouth of the river I did not know the charter-party; learned it on 11th when I was nearly half way up the river. Mr. Decan wrote me that masters of steam-tugs, by direction of defendants, offered to the master, plaintiff in this case, their services to tow his said vessel up said river to the port of New Orleans, which he refused.") That he had been urged by agents of his vessel & the defendants to take steam; that after said refusal & before the vessel arrived at New Orleans the defendants notified the agents of said vessel & the master that in consequence of said refusal they cancelled the charter-party; that out of the vessel of the tonnage of plaintiff's vessel that have come to the port of New Orleans from sea during the twenty years

past & more, fully ninety-five per cent. are and have been towed from the sea, the Passes, or within the river below, by tug-boats pro-
20 pelled by steam; that defendants were ship-brokers doing business in New Orleans; that they had twenty-five hundred bales of cotton engaged as cargo partly to fill said vessel, which were withdrawn from them in consequence of the failure of plaintiff to use steam in moving up from the mouth of the river, & thus insure some certainty as to time of arrival at the port of New Orleans, and that defendants had offers from others of cargo which they could not receive on account of the uncertainty as to the arrival of said vessel at New Orleans; that the time required to reach New Orleans from the mouth of the river by sail varied according to circumstances of wind, weather, & the current, from forty-eight hours to twenty days, and by steam-tugs from twenty-four hours to five days.

1st. The court charged the jury that if at the time defendants signed the said charter-party the jury find that defendants knew the said ship Adorna was at sea, the words in said charter-party "now lying in the harbor of New Orleans," should be regarded as of no significance whatever.

2nd. That the charter-party fixed no definite time for the vessel
21 to be in New Orleans ready to receive her cargo, nor did it stipulate that steam should be used to bring her from the mouth of the river to New Orleans. The master of the Adorna was therefore bound to use due and reasonable diligence in bringing her to the port of New Orleans, but he was bound to nothing more. If you are satisfied from all the facts in evidence that such diligence was used by him, whether he employed steam or not, then the charter-party remained binding, & the defendants had no right to declare it cancelled because the vessel did not arrive at an earlier time. If, on the other hand, you are satisfied that under all the circumstances the master of the Adorna failed to use due and reasonable diligence to bring his ship from the bar to the city, then the defendants were justified in declaring the charter-party at an end.

To each of said charges, first and second, the counsel for defendants excepted as each unfounded in law. The court overruled the exception; wherefore said counsel tendered his bill of exception to each of said charges, to be signed, which are accordingly signed.

22 (Signed) W. B. WOODS, *Judge.*

Rule for new trial.—Filed March 15th, 1877.

U. S. circuit court.

JAMES DAVIS, MASTER OF SHIP ADORNA, *vs.* LOVELL & BAILEY. } No. 6567.

On motion of Clarke, Bayne & Renshaw, of counsel for defendants, it is ordered that plaintiff show cause (if any he has) on 23rd inst., at 11 o'clock a. m., why a new trial should not be granted on the grounds following:

1st. That the verdict of the jury is contrary to the law and the facts in evidence.

2nd. That the court erred in allowing the plaintiff to testify in answer to the question propounded to plaintiff after he had testified to a refusal to take a steam-tug after he had entered the Mississippi River, "I

they (meaning the tug-boats) had offered to take him up at a pro rata rate, what would have been his action?"

3rd. That the court erred in declaring the law of the contract
23 of charter-party to be that the declaration in said charter-party that the vessel at the time of making said charter-party was in the port of New Orleans, if the defendants herein at the time she was at sea, and there being no time expressed for the ship being ready for cargo, should have no effect in construing the duties of the master as to the facilities he used for the bringing his vessel to said port of New Orleans, and if he reached the port of New Orleans with or without the aid of steam in the usual time by either sails or steam the defendants were not justified in refusing to load the vessel, though they had before said arrival notified their cancellation of said charter-party.

4th. That the court erred in instructing the jury as to the construction of said charter-party.

5th. That the damages assessed by the jury are excessive and not warranted by the law or the charge of the court nor the evidence.

Defendants' bill of exceptions.—Filed March 23d, 1877.

U. S. circuit court.

JAMES DAVIS, MASTER OF SHIP ADORNA,
vs.
LOVELL & BAILEY. } No. 6567.

24 Be it remembered that on the trial of this cause, the plaintiff Davis being in the stand as a witness, and having testified on behalf of said plaintiff that he had refused on his way up from the mouth of the river Mississippi with his said vessel, the Adorna, the aid of steamtugs tendered to him by the masters thereof, but he had refused the same at the rates charged, being full rates as from outside the bar, he was asked by his counsel, "If they (meaning the officers of the said tugboats) had offered to take him up at a pro rata rate, what would have done," to which question the counsel for defendants objected as improper in law to be put to the witness. The court overruled the objection. Whereupon the said counsel for defendants excepted to the ruling of the court admitting said question to be put to said plaintiff, witness on his own behalf, and tendered this bill of exception to be signed, which is accordingly signed.

[SEAL.] (Signed) W. B. WOODS, *Judge.*
MARCH 19TH, 1877.

25 *Rule.—Add'l grounds for a new trial.—Filed March 27th*, 1877.

United States circuit court.

JAMES DAVIS
vs.
LOVELL & BAILEY.

Additional ground for new trial.

Defendants, through their attorneys, respectfully move that plaintiff, James Davis, show cause, on Friday, 23d of March, 1877, at eleven o'clock, why a new trial should not be granted to the defendants on the

grounds heretofore stated, & on the further & additional ground that one of the jurors empanelled & sitting on the hearing & trial of this case was guilty of misconduct on & during said hearing & trial, to the prejudice & injury of defendants, defeating their right to a fair & impartial hearing & trial of this case, & to a fair & impartial consideration, hearing, & examination of the testimony thereafter to be adduced, viz: Thomas, one of the said jurors, that on the first day of the hearing & trial of said case, the 9th of March, 1876, at the recess taken on that day, in violation of the express instruction & order of the court, said juror, Thomas, conversed with Frank M. Hall & Joseph Leach,
26 & said in their presence that it was a clear case against Lovell & Bailey (the affidavits of said Joseph Leach & Frank M. Hall are filed herewith as part of this motion); that said conversation and said statements were made publicly by said juror, after hearing part or the whole of plaintiff's testimony in his own behalf in this case, & before said juror or any of the jurors in this case had heard any part of defendants' testimony, or any of the witnesses in their behalf.

(Signed) W. S. BAILEY,
" JOS. F. LOVELL.

W. S. Bailey & Joseph F. Lovell, being duly sworn, say that they have been informed of the matters herein stated since the trial of this case, by Joseph Leach & Frank M. Hall; that they verily believe that the same are true, and that they have not had a fair & impartial hearing of the testimony & trial of this their case.

(Signed) W. S. BAILEY,
" JOS. F. LOVELL.

Sworn to and subscribed before me on this 22d of March, A. D. 1877.

J. G. EUSTIS,
U. S. Com'sr for Dist. of La.

27 *Affidavit of Joseph Leach.*

I, Joseph Leach, being sworn, says that on the 9th day of March, 1877, during the recess of the United States circuit court, while the case of Davis vs. Lovell & Bailey was on trial before said court, that Mr. Thomas, one of the jury before whom said case was on trial, said in the presence of this affiant & Mr. F. M. Hall that it was a clear case against Lovell & Bailey, & that affiant said, "You had better wait till you hear the evidence in behalf of defendants." This conversation was after the examination of Captain Davis.

(Signed) JOSEPH LEACH.

Sworn to and subscribed before me this 17th day of March, A. D. 1877.

J. G. EUSTIS,
United States Commissioner, District of Louisiana.

Affidavit of Frank M. Hall.

I, F. M. Hall, do solemnly swear that on the 9th day of March, 1877, during the recess of the United States circuit court, in the case of
28 James Davis, of ship Adorna, versus Lovell & Bailey, that Mr. Thomas, one of the jurymen sitting on said case, remarked to me that it was a clear case against Lovell & Bailey.

(Signed) FRANK M. HALL.

Sworn to and subscribed before me on the 15 day of March, A. D. 1877.

(Signed) J. G. EUSTIS,
U. S. Commissioner for District of Louisiana.

Let this be filed.
M'ch 27th, 1877.
(Signed) W. B. WOODS, *Judge.*

[*Submission of rule.—Extract from minutes from March 28th, 1877.*]

U. S. circuit court.

JAMES DAVIS, MASTER, *vs.* LOVELL & BAILEY. } No. 6567.

The rule for a new trial was called—Clark, Bayne & Renshaw for plaintiffs in rule; Singleton & Browne for defendants in rule—and after hearing argument the court took time to consider.

Order for new trial refused.

U. S. circuit court.

JAMES DAVIS, MASTER, *vs.* LOVELL & BAILEY. } No. 6567.

29 The court duly considered the motion for a new trial, and perceiving no reason to disturb the verdict and judgment in the premises, ordered that a new trial be refused, with costs.

Judgment.—Extract from judgment book.

Circuit court of the United States, fifth circuit and district of Louisiana.
November term, 1876.

NEW ORLEANS, *March 12th*, 1877.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, circuit judge.

JAMES DAVIS, MASTER SHIP ADORNA, *vs.* LOVELL & BAILEY. } No. 6567.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, James Davis, master of the ship Adorna, recover from the commercial firm of Lovell and Bailey, and from J. F. Lovell, W. S. Bailey, and T. F. Gwathmey, the indi-
30 vidual members thereof, in solido, eleven thousand seven hundred and seventy $\frac{56}{100}$ dollars, with five per cent. per annum interest from 25th November, 1871, until paid, and costs of suit.

Judgment rendered March 12th, 1877.
Judgment signed April 5th, 1877.
(Signed) W. B. WOODS, *Judge.*

Petition and order for writ of error.—Filed April 11th, 1877.

United States circuit court.

JAMES DAVIS
vs.
LOVELL & BAILEY. } No. 6567

To the honorable the circuit court of the United States, fifth circuit and district of Louisiana:

The petition of Lovell & Bailey, a commercial firm composed of Joseph Lovell, William S. Bailey, & T. F. Gwathmey, and of the several members thereof, William S. Bailey, Joseph Lovell, & T. F. Gwathmey, respectfully shows that they are aggrieved by the final judgment rendered against them on the 12th day of March, 1877, and signed on the 5th day of April, 1877, for the sum of eleven thousand seven hundred
31 & seventy & $\frac{56}{100}$ dollars, with five per cent. per annum interest, from the 25th of November, 1871, and costs, in favor of James Davis, master of the ship Adorna.

Wherefore petitioners pray that a writ of error may be allowed to them, returnable to the Supreme Court of the United States at Washington City, at its session to be holden on the second Monday in October, in the year 1877, and that said writ may operate as a supersedeas, on executing and filing a bond with good and sufficient sureties in the sum of eighteen thousand dollars, and that James Davis, master of the ship Adorna, be cited to appear in said Supreme Court of the United States on the second Monday in October, 1877, to answer said writ of error; & petitioner prays for general & equitable relief.

(Signed) CLARKE, BAYNE & RENSHAW,
Att'ys for Pet'rs.

Order.

A writ of error to operate as a supersedeas is allowed in this case, as prayed for and according to law, returnable to the Supreme Court of the United States on the second Monday of October, 1877, the peti-
32 tioners giving bond in the sum of eighteen thousand dollars, with good and solvent security, conditioned as the law directs.

New Orleans, April 11th, 1877.

(Signed) W. B. WOODS, *Judge.*

Bond for writ of error.—Filed April 11th, 1877.

United States circuit court.

LOVELL & BAILEY & T. F. GWATHMEY, plaintiffs in error,
vs.
JAMES DAVIS, MASTER OF SHIP ADORNA, defendant in error. } No. 6567.

Know all men by these presents that we, Lovell & Bailey, W. S. Bailey, Joseph F. Lovell, & T. F. Gwathmey, as principals, and Albert Shultz & Albert Zerega as sureties, are held and firmly bound unto James Davis, master of the ship Adorna, in the full & just sum of eighteen thousand dollars, to be paid to the said James Davis, master of

the ship Adorna, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by
33 these presents, sealed with our seals, and dated this eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein James Davis, master of the ship Adorna, is plaintiff, and Lovell & Bailey, W. S. Bailey, J. F. Lovell, & T. F. Gwathmey, are defendants, judgment was rendered against the said Lovell & Bailey, W. S. Bailey, J. F. Lovell, & T. F. Gwathmey, defendants, and the said Lovell & Bailey, W. S. Bailey, J. F. Lovell, & T. F. Gwathmey, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Davis, master of the ship Adorna, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said Lovell & Bailey, W. S. Bailey, Joseph F. Lovell, & T. F. Gwathmey, shall prosecute their writ to effect, and answer all damages & costs if they fail to make their plea good, then the above obligation
34 to be void, else to remain in full force and virtue.

(Signed)	LOVELL & BAILEY.	[L. S.]
"	W. S. BAILEY.	[L. S.]
"	JOS. F. LOVELL.	[L. S.]
"	T. F. GWATHMEY.	[L. S.]
"	ALBERT SHULTZ.	[L. S.]
"	ALBERT ZEREGA.	[L. S.]

Sealed and delivered in presence of—

Approved.

W. B. WOODS, *Judge.*

Affidavit of Albert Zerega.

STATE OF LOUISIANA,
City of New Orleans:

Personally appeared before me, the undersigned authority, Albert Zerega, who, being first duly sworn, says that he signed the within bond, and after the payment of all his debts he is worth the sum of five thousand dollars.

(Signed) ALBERT ZEREGA.

Sworn to and subscribed before me on this 11th day of April, A. D. 1877.

(Signed) J. G. EUSTIS,
U. S. Commissioner for the District of Louisiana.

Affidavit of Albert Shultz.

STATE OF LOUISIANA,
City of New Orleans:

Personally appeared before me, the undersigned authority, A.
35 Shultz, who, being first duly sworn, says that he signed the within

bond, and after the payment of all his debts he is worth the sum of eighteen thousand dollars.

(Signed) A. SHULTZ.

Sworn to and subscribed before me on this 11th day of April, A. D. 1877.

(Signed) J. G. EUSTIS,
U. S. Commissioner for the District of Louisiana.

36 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 35 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of James Davis, master of ship Adorna, vs. Lovell & Bailey, No. 6567 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 5th day of September, A. D. 1877.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, W. B. Woods, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law; and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 5th day of September, A. D. 1877.

W. B. WOODS, *Judge.*

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between James Davis, master of the ship Adorna, plaintiff, & Lovell & Bailey, & W. L. Bailey, J. F. Lovell, & T. F. Gwathney, defendants, a manifest error hath happened, to the great damage of the said Lovell & Bailey, W. L. Bailey, J. F. Lovell, & T. F. Gwathney, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme

Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Chief Justice of the said Supreme Court of the United States, this eleventh day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 6567. Lovell & Bailey, & T. F. Gwathney, pl'ffs in error, versus Jas. Davis, master of ship Adorna, def't in error. Writ of error. Filed April 11, 1877. F. B. Vinot, d'y cl'k.

38 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to James Davis, master of ship Adorna, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein Lovell and Bailey, a commercial firm composed of Joseph Lovell, William S. Bailey, and T. F. Gwathney, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] W. B. WOODS, *Judge.*

39 (Indorsed:) United States circuit court. No. 6567. Lovell & Bailey, plaintiffs in error, vs. James Davis, master of ship Adorna, defendant in error. Citation.

Marshal's return.

Received, Apr. 10, 1877, by the U. S. marshal, and, on the 18th day of April, 1877, served a copy hereof on James Davis, within named, by handing the same to him in person, in the city of New Orleans.

S. W. REED,
D'y U. S. Marshal.

(Indorsement on cover:) No. 196. Lovell & Bailey, & W. S. Bailey, J. F. Lovell, & T. F. Gwathmey, plaintiffs in error, vs. James Davis, master of the ship Adorna. Louisiana C. C. U. S. Filed 28th September, 1877.

In Supreme Court of the United States.

LOVELL & BAILEY
vs.
DAVIS, Master.

No. 196.

Brief for Plaintiffs in Error.

P. PHILLIPS,
W. HALLETT PHILLIPS,
Counsel for Plaintiffs in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

Supreme Court of the U. S.

LOVELL & BAILEY
vs.
DAVIS, MASTER.
No. 196.

Brief for Plaintiffs in Error.

On the 14 March, 1871, Lovell & Bailey, ship brokers of New Orleans, chartered the ship *Adorna* from Decan, Zerega & Co., agents of the owners.

In the charter-party the ship is described as "now lying in the harbor of New Orleans," and the voyage to be from New Orleans to Liverpool, the charterers agreeing to furnish the vessel a full cargo of cotton. It is further mentioned that the charter-party should commence when the vessel was ready to receive cargo at the place of loading, and notice given to the charterer, and end on true delivery of the cargo at port of discharge.

The bill of exceptions shows that at the time the charter-party was signed, the *Adorna* was at sea, having left Liverpool for New Orleans February 1.

After a voyage three or four days longer than the average, she arrived, on April 9, at the mouth of the Mississippi.

Instead of the ship taking steam, or, in other words, procuring the services of a tow-boat to take her up the river, she proceeded to sail up to New Orleans. The captain says: "Mr. Decan wrote me that masters of steam-tugs, by direction of defendants, offered to the master, plaintiff in this case, their services to tow his vessel to New Orleans, which he refused." He further says that he had been urged by agents of his vessel and the defendants to take steam.

It was shown at the trial that 95 per cent. of the ships of the tonnage of that of the *Adorna*, which had come to the port of New Orleans from sea during twenty years past, had been towed from the sea, the passes, or within the river, by tug-boats propelled by steam.

That the time required to reach New Orleans from the mouth of the river by sail varied, according to circumstance of wind, weather, and the current, from forty-eighty hours to twenty days, and by steam-tug, from twenty-eight hours to five days.

The charterers, Lovell & Bailey, on being informed of the refusal to take steam, on April 14 notified the master that in consequence of such refusal they cancelled the charter-party.

At the time of such refusal they had engaged twenty-four hundred bales of cotton as cargo for the vessel. These were withdrawn from them in consequence of the failure to use steam in moving up from the mouth of the river, and thus insure some certainty as to the time of arrival at the port of New Orleans. They had also offers of cargoes from others, which they could not receive for the same reason.

On the ship arriving at New Orleans, Lovell & Bailey refused to accept her, and thereupon this action was brought by the master claiming the whole amount he would have earned if the ship had been freighted under the charter.

Under the instructions of the court there was a verdict

for plaintiffs for $11,700, with interest, and judgment accordingly.

These instructions, we maintain, were erroneous, and are assigned for error.

The court charged the jury—

First. That if the defendants signed the charter-party, and the jury found that defendants knew the *Adorna* was at sea, the words "now lying in the harbor of New Orleans should be regarded of no significance whatever."

Second. That the charter-party fixed no definite time for the vessel to be in New Orleans, nor did it stipulate that steam should be used to bring her from the mouth of the river to New Orleans.

The master of the *Adorna* was therefore bound to use due and reasonable diligence in bringing her to the port of New Orleans. If you are satisfied, from all the facts in evidence, that such diligence was used by him, whether he employed steam or not, then the charter-party remained binding, and the defendants had no right to declare it cancelled because the vessel did not arrive at an earlier time.

Argument.

The charter-party describes the vessel as being in the port of New Orleans.

While not contending that this expression constituted a warranty, it is significant as showing that the parties contracted with a view to quick despatch. The ship had sailed over a month and a half previous to the signing of the charter-party for New Orleans; so that, while not actually in the port, she was expected.

Dimech vs. *Corlett*, 12 Moore Privc., 216.

It was, therefore, a serious error to charge that, if the

parties knew that the *Adorna* was not in port, the jury should attach *no consideration whatever to the clause.*

The second charge is even more material.

The question of the case is whether the plaintiff was in fault as to a material part of the contract which warranted the charterers in giving notice of a dissolution of the charter-party. We say they were.

In all contracts by charter-party, the law implies that there shall be no unusual or unreasonable delay in commencing the voyage—and that the ship should proceed, with all reasonable dispatch, to her destination.

The conditions of the contract, the nature of the cargo, and the object of the voyage, may all be considered in determining what is reasonable.

The Success, 7 Bl., 552;
McAndrew vs. *Adams*, 1 Bing. N. C., 29, 38.

In contracts of affreightment, the necessity for dispatch is urgent. By a very short delay the proper season may be lost, or the object of the voyage defeated.

Besides it is to be presumed that the freighter makes his bargain with knowledge of the then existing state of freights, or in expectation of one at no remote period. When, in addition, it is considered how liable to fluctuation the rate of freights is, from a variety of causes, time must be a most important element in the formation and completion of such a contract.

Dimech vs. *Corlett*, *Sup.*

These views are very well expressed by this court in *Lawler* vs. *Bangs*.

"Promptitude in the fulfillment of engagements is the life of commercial success. The state of the market at home and abroad; the solvency of houses; the rates of exchange and of freight, and various other circumstances

which go to control the issues of profit or loss, render it more important in the enterprises of the trader than in any other business. The result of a voyage may depend upon the day the vessel arrives at her port of destination, and the time of her arrival may be controlled by the day of her departure from the port whence she sailed."

Lawler vs. *Bangs*, 2 Wall., 736.

In that case the charter-party provided that the vessel which was then at sea "should proceed from Melbourne to Calcutta with all possible dispatch." The question was, whether the failure to comply with this stipulation gave the charterer a right to rescind. The Court held in the affirmative.

Where a charter-party provided "the ship expected to be in Alexandria about the 15th December," the Court held that this was an undertaking to have the ship there about that time, on the ground that it must be of the utmost importance for the charterers to know when the ship was to be at the port of loading.

Corking vs. *Massey*, L. R., 8 C. P., 400.

The necessity of a prompt arrival at the port of loading is shown by the circumstances attending the case at bar.

Lovell & Bailey were ship-brokers, whose interest in the adventure depended on their success in obtaining from other parties a cargo to load the vessel. This, of course, would largely depend on the time of the arrival of the vessel. The 2,500 bales of cotton which they had procured for the *Adorna*, as we have seen, was withdrawn from them upon the refusal to take steam, and the consequent uncertainty of her arrival. For a like reason they had to decline other cargoes which were promised them.

The court below, while recognizing the principle we contend for, disregarded the evidence which showed its viola-

tion by the plaintiff. The judge charged that the master of the *Adorna* was bound to use due diligence in bringing her to the port of New Orleans, and that, if the jury were satisfied such diligence was used, *whether he employed steam or not*, the defendant had no right to cancel the charter-party.

This was in the face of the almost universal custom of sailing vessels to take steam in order to insure punctuality and promptitude in arrival, and to prevent a long delay in coming up to the city. A refusal to adopt the ordinary and usual facilities to reach the port amounted to a want of due diligence, and the court should have so charged.

In entering into the contract, to have the vessel at New Orleans, it must be presumed that the parties contracted subject to the usages of the port. The judge says the charter party did not specify that the ship should take steam. But there is no need of specifying what was the general practice.

If a person of a particular occupation, in a certain place, makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons in the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporated them into their agreements, if nothing is said to the contrary.

Robinson vs. *U. S.*, 13 Wall. 366.

This rule has often been applied to contracts of charter party.

"The principle," says Lord CAMPBELL, "on which evidence of usage is admissable for such a purpose is that the

parties have not set down on paper the whole of their contract in all their terms, but those only which were necessary to be determined in the particular case by specific agreement, and which, of course, might vary indefinitely; leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract, unless they expressly exclude them.

Humphrey vs. *Dale*, 26 L. J., (Q B.), 137.

We submit that at the time Lovell & Bailey gave the notice of dissolution, they were justified in so doing, under the state of facts then existing.

They only acted after a refusal of the plaintiff to use the ordinary means for fulfilling his engagement; when they saw frustrated the object for which they had chartered the vessel. The ship reached New Orleans April 15—six days coming up—the usual time being 18 to 48 hours.

Even this must have been under very favorable circumstances.

The court also erred in permitting the plaintiff to be asked if the tug-boats had offered to take him up *pro rata*, what would he have done.

The question was hypothetical and improper. Its purpose was to cause the jury to believe that he would have taken steam if he had been charged *pro rata*—of which facts there was no evidence.

Etting vs. *B'k U. S.*, 11 Wh. 59;
United States vs. *Breitling*, 20 How., 254;
Irving vs. *Irving*, 9 Wall.,630.

But if our view of the case is correct, nothing could dispense with the obligations of the master, except circumstances beyond his control.

Some charter-parties contain what is called by mer-

chants "a cancelling date, which reads: "should the vessel not arrive at the loading port on or before the —— of the ——, the charterers or their agents to have the option of cancelling this charter-party. In the case at bar—taking into view the time the vessel sailed from Liverpool, and presuming she would use the usual facilities to get up to New Orleans—she was daily expected to arrive. There was no need to insert such a condition. It was understood, and as such a condition was a material one, a breach would justify a dissolution whether the contract said so or not.

We submit that the judgment should be reversed.

P. PHILLIPS,
W. HALLETT PHILLIPS,
Counsel for Plaintiffs in Error.